



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 233 OF 2019

(CORAM: OKWENGU, GATEMBU & MURGOR, J.J.A)

BETWEEN

MUSANE OLE PERE.....1ST APPELLANT/APPLICANT

FRANCIS PARIKEN NDOINYO.....2ND APPELLANT/APPLICANT

AND

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER,

NAROK SOUTH & 24 OTHERS.....RESPONDENTS

(Being an Application for an order of injunction under Rule 5(2)(b) of the Court of Appeal Rules pending the hearing and determination of an intended appeal from the Ruling and Order of the Environment and Land Court at Narok (M. Kullow, J) dated and delivered on the 16th day of July, 2019

in

ELC CONSTITUTIONAL PETITION NO. 19 OF 2018)

RULING OF THE COURT

[1] This is an application for orders of injunction under **Rule 5(2)(b)** of the **Court of Appeal Rules** pending the hearing of an appeal against the ruling of the Environment and Land Court (ELC), delivered on 16th July, 2019 in which the learned Judge upheld a preliminary objection and struck out a petition that had been filed by the applicants against the respondents.

[2] In their petition the applicants were aggrieved by the survey work and the land adjudication process that was being done in Naikala adjudication section in Narok South, contending that the same was unconstitutional, arbitrary, unlawful, and done without public participation as required in the Constitution.

[3] The respondents raised a preliminary objection to the petition contending that the applicants' suit was premature as the adjudication register had not become final as required under **section 30** of the **Land Adjudication Act**, which provides that the court cannot entertain any civil proceedings concerning an interest in land in an adjudication area until the adjudication register had become final.

[4] What is before us is a motion for orders of injunction pending an appeal against the striking out of the applicants' suit. In effect, the injunction is intended to preserve the substratum of the applicants' suit. Therefore, the applicants have to satisfy the twin requirements of **Rule 5(2)(b)** of the **Court of Appeal Rules**. These have been stated by this Court in many cases. For instance, **Omolo, JA** in **Safaricom Limited - vs- Ocean View Beach Hotel Limited & 2 Others [2010] eKLR**, stated as follows:

“The Court has, over the years, developed certain well known guidelines on which it will grant or refuse to grant the preservative order sought. The appeal or the intended appeal must be one which is arguable, i.e. one which is not frivolous. If an appeal or the intended appeal is a frivolous one, the Court will refuse to grant an order

preserving the status quo. Again the party seeking the preservative order must show to the Court that if an order is not granted and his appeal or the intended appeal were to succeed in the end, that success would have been rendered nugatory by the earlier refusal to grant the preservative order.”

[5] The applicants have filed a notice of appeal. They have also annexed a draft memorandum of appeal in which they have faulted the ruling of the learned Judge on 10 grounds. It is trite that the intended appeal should not necessarily be one that will succeed, but one that raises a *bona fide* issue worthy of consideration by the Court. (See **Kenya Tea Growers Association & Another -vs- Kenya Planters Agriculture Workers Union, (2012) eKLR**).

[6] We have considered the grounds set out by the applicants from which it is evident that the applicants are faulting the learned Judge for upholding the preliminary objection anchored on the provisions of **section 29 & 30** of the **Land Adjudication Act**. In their view, their rights under the Constitution which they contend were violated, rank superior. With respect, we find that the issues raised by the applicants are not arguable, because the applicants are effectively challenging the process of adjudication and section 30 of the Land Adjudication Act is clear in that regard that:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final.”

[7] Therefore, while the applicants have the right to seek redress for their violations, their complaint in regard to the adjudication process, must comply with the process provided under the Land Adjudication Act, particularly the provisions of section 30 of the Land Adjudication Act that is mandatory, before a suit can be filed. That provision not having been complied with, the applicants’ petition was filed prematurely and no arguable issue can arise in regard to the order of the learned Judge, as the court had no jurisdiction to deal with the matter.

[8] In **Ahmed Musa Ismael vs Kumba ole Ntamurua [2014] eKLR**, the Court in considering the nugatory aspect, stated as follows:

“The 2nd limb and both limbs must be established is an indication that stays or injunctions are not automatic. Rather, they are granted to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual”.

[9] The adjudication process that is the subject of the applicant’s complaint is still ongoing. The applicant’s appeal cannot be rendered nugatory as the process even if finalized, can be reversed.

[10] For the above reasons, we find that the applicants have failed to satisfy the requirements of **Rule 5(2)(b)** of the **Court of Appeal Rules**. This is to say that the applicants do not have an arguable appeal upon which the orders of injunction that they seek can be anchored. Nor can we issue a preservative order to preserve a right, which has not matured.

[11] The upshot of the above is that, we find no merit in this application.

It is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU (FCI Arb.)

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR